INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes and Regulations Involved	3
Statement of the Case	3
Argument:	
I. Petitioner's Attack States Only Their Disagreement With Agency Policy, Not A Question Of Law	7
II. The Decisions Of The Courts Below Are Correct	10
A. The Criteria Applied By The Board Are Valid	10
B. Petitioners Had No Right To An Evidentiary Hearing	14
C. The Board's Findings Are Supported By Substantial Evidence	16
Conclusion	17
Appendix	18

CITATIONS

Cases:

American Airlines, Inc. v. *CAB*, 123 App. D.C. 310, 359 F.2d 624, *cert. denied*, 385 U.S. 843 (1966)	15
American Airlines, Inc. v. *CAB*, 97 App. D.C. 324, 231 F.2d 483 (1956)	15, 16
Central Truck Lines, Inc. v. *Pan-Atlantic S.S. Corp.*, 82 M.C.C. 395 (1960), *aff'd. sub nom., Sea-Land Service, Inc.* v. *United States*, 222 F. Supp. 558 (D. Del. 1963)	12

Page

Eastern Air Lines, Inc. v. *CAB*, 87 App. D.C. 331, 185 F.2d 426 (1950) 15, 16
Federal Communications Commission v. *WJR*, 337 U.S. 265 (1949) 16
Motor Transportation of Property Incidental to Transportation by Aircraft, 95 M.C.C. 71 (1964) 13
St. Louis, Mo.-East St. Louis, Ill. Commercial Zone, 61 M.C.C. 489 (1953) 15
Tennessee Elec. Power Co. v. *TVA*, 306 U.S. 118 (1939) 16

Statutes:

Administrative Procedure Act, 5 U.S.C. § 553(c) ... 15
Civil Aeronautics Act of 1938, Act of June 23, 1938, ch. 601, 52 Stat. 977
Section 403(a) 4

Federal Aviation Act of 1958
Section 204(a) (49 U.S.C. § 1324(a)) 4, 14
Section 403(a) (49 U.S.C. § 1373(a)) ...4, 5, 6, 10, 14
Section 404 (49 U.S.C. § 1374) 4
Section 1002(d) (49 U.S.C. § 1482(d)) 4

Interstate Commerce Act
Section 202(c)(1) (49 U.S.C. § 302(c)(1)) 13
Section 203(b)(7a) (49 U.S.C. § 303(b)(7a)) 4, 5, 13
Section 203(b)(8) (49 U.S.C. § 303(b)(8)) 13

Regulations:

Civil Aeronautics Board
Part 222 (14 C.F.R. 222) 5, 6, 8, 10, 14
Section 222.3 (14 C.F.R. 222.3) 5, 14

Interstate Commerce Commission
Section 210.40 (49 C.F.R. § 210.40) 5, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 989

LAW MOTOR FREIGHT, INC. and NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.,
Petitioners,

v.

CIVIL AERONAUTICS BOARD and EMERY AIR FREIGHT CORPORATION,
Respondents.

No. 1160

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., and UNITED MOTOR FREIGHT, INC.,
Petitioners,

v.

CIVIL AERONAUTICS BOARD and EMERY AIR FREIGHT CORPORATION,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the First Circuit and the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit and the opinion and order of the Civil Aeronautics Board affirmed by the Court of Appeals for the First Circuit are adequately described and set forth in the Appendix of the Petition in No. 989 at 13a-31a.

The judgment of the Court of Appeals for the District of Columbia Circuit and the opinion and order of the Civil Aeronautics Board affirmed by the Court of Appeals for the District of Columbia Circuit are adequately described and set forth in the Appendix of the Petition in No. 1160 at 13a-22a.

JURISDICTION

The jurisdictional requisites in each case are adequately set forth in the respective Petitions.

QUESTIONS PRESENTED

1. Whether the determinations of the Civil Aeronautics Board that particular motor vehicle services proposed to be included in an air carrier's tariff are "services in connection with . . . air transportation" within the meaning of section 403(a) of the Federal Aviation Act, and therefore to be treated as pickup and delivery services to and from certain airports for air cargo shipments, have a rational basis reasonably within the meaning of the statutory phrase quoted.

2. Whether, prior to making these determinations, the Civil Aeronautics Board was required to hold evidentiary hearings where: (a) the statute requires none; (b) Petitioners were given notice and an opportunity to present to the Board in written form any facts and argument in rebuttal to matters set forth in the applications and

relied on by the Board; (c) Petitioners tendered no issue of material fact; and (d) Petitioners' only interest was freedom from competition by the air carriers.

3. Whether the findings of the Civil Aeronautics Board are supported by substantial evidence.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Federal Aviation Act are Section 403(a), 49 U.S.C. § 1373(a) (set forth in the Appendices of the Petitions in Nos. 989 and 1160), and Section 204(a), 49 U.S.C. § 1324(a) (set forth at page 18 of the Appendix hereto). The pertinent provisions of the Interstate Commerce Act are Section 203(b)(7a), 49 U.S.C. § 303(b)(7a) (set forth in the Appendices of the Petitions in Nos. 989 and 1160), Section 202(c)(1), 49 U.S.C. § 302(c)(1), and Section 203(b)(8), 49 U.S.C. § 303(b)(8) (set forth at pages 18-19 of the Appendix hereto). The pertinent provision of the Administrative Procedure Act is contained in 5 U.S.C. § 553(c) (set forth at page 19 of the Appendix hereto). The pertinent provisions of the regulations of the Civil Aeronautics Board and the Interstate Commerce Commission are set forth in the Appendices of the Petitions in Nos. 989 and 1160.

STATEMENT OF THE CASE

A brief description of the historical background of the regulations involved is necessary to an understanding of the case.

Since aircraft can operate only to and from airports, air freight must move to some extent by surface means in order to flow between aircraft and airport, on the one hand, and consignee or consignor, on the other hand. That such a surface movement for the pickup and de-

livery of air freight is an essential part of the air movement and should be regulated as such, was recognized by Congress in its first comprehensive aviation regulatory statute, the Civil Aeronautics Act of 1938 (Act of June 23, 1938, ch. 601, 52 Stat. 977), predecessor statute to the present Federal Aviation Act of 1958. In the 1938 statute Congress amended section 203(b) of the Interstate Commerce Act by adding subsection (7a) (49 U.S.C. § 303(b)(7a)) so as to exempt from motor carrier economic regulation by the Interstate Commerce Commission

> "the transportation of . . . property by motor vehicle when incidental to transportation by aircraft . . . ."

At the same time a provision was inserted in section 403 (a) of the Civil Aeronautics Act of 1938 which required direct and indirect air carriers to include in air transportation tariffs filed with the Board "all classifications, rules, regulations, practices and services in connection with such air transportation." That provision continues in effect in the same section of the present Federal Aviation Act (49 U.S.C. § 1373(a)). Other provisions of the present Act give the Board certain regulatory powers over matters contained in tariffs (e.g., sections 204a, 404, 1002(d), 49 U.S.C. §§ 1324(a), 1374, 1482(d)).

The Board and the Commission for many years have interpreted these statutory provisions as constituting bona fide motor vehicle pickup and delivery service for air freight a service "in connection with . . . air transportation" which is to be included in air carrier tariffs as a part of air transportation service and rates and which is exempt from economic regulation by the Commission under the Interstate Commerce Act. Until recently there were no general regulations prescribing precisely how the respective provisions of section 403(a) of the Federal Aviation Act and section 203(b)(7a)

of the Interstate Commerce Act would be administered and meshed.

In 1964, however, following joint consultations between the Board and the Commission, the two agencies issued complementary regulations as a means of clarifying what in general would be regarded as reasonable areas for air freight pickup and delivery service—and also providing procedures for their determination in particular instances.

The regulation adopted by the Board at that time was Part 222 of its Economic Regulations. The statutory basis for Part 222 is the provision of section 403(a) of the Federal Aviation Act that air transportation tariffs should include "services in connection with such air transportation."

Concurrently with the issuance of the Board's regulation, the Interstate Commerce Commission issued a regulation (49 C.F.R. § 210.40) in which it provided that areas for services "incidental to transportation by aircraft" within the meaning of the exemption from motor carrier economic regulation provided by section 203(b)(7a) of the Interstate Commerce Act would be the pickup and delivery areas established in air carrier tariffs pursuant to Part 222 of the Board's regulations.[1]

Part 222 of the Board's regulations provides that pickup and delivery services "to places which are not located beyond a radius of 25 miles of the airport or of the city limits of the certificated point" may be included in air carrier tariffs without the necessity of Board consideration or approval. Board approval of service beyond such an area, however, must be sought, under section 222.3 of

[1] The Commission reserved the right on "its own motion or petition" to determine whether the exempt area should be different at a particular point than that set out in air carrier tariffs. As the Commission also noted, these exemptions apply only for the carriage of air freight in a continuous movement under a through airbill.

Part 222, by filing of an application for authority to file a tariff for such service. The Board is then to make a determination whether the service proposed is "in connection with . . . air transportation" within the meaning of section 403(a) of the Federal Aviation Act. The standards by which the Board makes this determination are set forth in a narrative preamble to Part 222 of the Board's Economic Regulation:

> "The Board will consider any such requests [for authority to file a tariff to provide air cargo pick-up and delivery service beyond the 25-mile zone] in the light of whether the proposed service is truly air cargo pickup and delivery with the use of specialized equipment (vans or straight trucks) and geared to meeting airline schedules and oriented to customer air transportation needs, as distinguished from line-haul or over-the-road surface transport." (Appendix of Petition in No. 1160 at 9a)

Emery Air Freight Corporation, an air freight forwarder, filed applications pursuant to Part 222 for authority to file air cargo pick-up and delivery tariffs for such service between the Boston, Massachusetts, airport and Nashua, New Hampshire, and for such service between the Detroit, Michigan, airport and Flint, Michigan. The airline distance between Boston and Nashua is 34 miles; the airline distance between Detroit and Flint is 45 miles.

Pursuant to the procedure provided in Part 222, Petitioner had an opportunity to file, and did file, with the Board objections to the grant of both applications. The Board denied Petitioners' motions to dismiss Emery's applications, denied, after receiving Petitioners' written submissions, Petitioners' requests for an evidentiary hearing on the applications, and granted both applications (Appendix of Petition in No. 989 at 26a-31a; Appendix

of Petition in No. 1160 at 17a-22a). Petitioners sought judicial review of the order relating to Nashua service in the United States Court of Appeals for the First Circuit and of the order relating to Flint service in the United States Court of Appeals for the District of Columbia Circuit. On review, both courts affirmed (Appendix of Petition in No. 989 at 13a-25a; Appendix of Petition in No. 1160 at 13a-17a).

ARGUMENT

I. Petitioner's Attack States Only Their Disagreement With Agency Policy, Not A Question Of Law.

These cases do indeed, as Petitioners have noted, present "new policy questions." But they are *policy* questions and, as such, have been entrusted by statute to the Civil Aeronautics Board and the Interstate Commerce Commission under broad general standards. Those standards—motor vehicle service "in connection with . . . air transportation" and motor vehicle service "when incidental to transportation by aircraft"—obviously must derive their content and meaning primarily from policy concepts as to how best to mesh the surface pickup and delivery and the air freight movement. The arguments which Petitioners would have the Court consider and act on are, at most, simply disagreements with the policy concepts the Board and Commission have now adopted in their regulations on the subject. Unless and until agency resolution of the policy questions results in a conflict in the agencies' assertions of jurisdiction there exists no legal question warranting this Court's review.

Petitioners seek this Court's interest and attention for its challenge by describing what they view as a conflict between the Board's assertion of its duty to promote air transportation and the role of the Interstate Commerce

Commission in regulating motor transportation.[2] Petitioners assert a conflict which does not exist.

Petitioners ignore the fact that the Board statement concerning the development of air cargo transportation, in which it defined Board policy in the matter of air cargo pick-up and delivery service, was issued only after *joint consultation* between the Board and the Commission and that that policy represents a *joint resolution* of the potential jurisdictional conflict. The Commission itself issued its own complementary regulation on the subject (49 C.F.R. § 210.40) in which it expressly recognized the Board's regulation and made specific provision for the consistent operation of its regulation with the Board's.

Nor does any conflict arise from the fact that the Commission itself defines *air* carrier pickup and delivery zones in a different and broader manner than it defines *surface* carrier pick-up and delivery zones. This difference is firmly grounded on basic differences in the modes of transportation and on differences in the statutory provisions being applied: See discussion at pages 12-14, *infra*. Earlier Commission decisions (see Appendix of Petition in No. 1160 at 16a) on the basis of which Peti-

---

[2] The Board is under a congressional mandate to promote the development of air transportation. The Board stated its conclusion in the narrative preamble to Part 222 of its regulations that:

> "Full development of air cargo transportation depends, in large measure, upon efficient surface transportation; effective customer-oriented pickup and delivery service can best be guaranteed when it is under the control of the direct air carrier or the air freight forwarder; this control can be maintained by the operation of trucks directly by the air carrier and the air freight forwarder or under contract with local cartage agents; and a reasonable amount of freedom for the direct air carriers and air freight forwarders to establish pickup and delivery services and to test their adequacy and economy is vital to prevent a stifling of the potential of air cargo transportation." (Appendix of Petition in No. 1160 at 8a)

tioners suggest the possibility of a conflict must be viewed in the light of the Commission's more recent decisions and joint action with the Board.

Neither the Board nor the Commission has been heard to complain of any agency conflict in this matter. While these agencies are in the middle of a constructive joint search for a policy which will accommodate the nation's air transportation needs without injuring the nation's transportation system as a whole, it would be wholly inappropriate to judicially define that policy, by way of statutory construction, where, as here, the applicable statutory standards were broadly stated in order to permit the administrative flexibility necessary to meet future avenues of development in a new mode of transportation.

It is not the Board's policy as embodied in the regulation and orders involved here that has major ramifications for the nation's transportation system as Petitioners suggest. The ramifications are implicit in the changes being brought about by technological advances in the air transport industry itself. The Board, and the Commission, must be permitted reasonable latitude to work out the intermodal transport problems created by those advances. Petitioners would have the capacity of the agencies to meet these dynamic developments reduced to a purely legalistic formula. There is nothing in the language of the statutes which warrants such a narrow approach. Common sense condemns it.

As to procedure, Petitioners ask this Court to declare that there is a right to an evidentiary hearing on these Board determinations of general and future application even though the statute under which the Board acted affords no such right. That the right to an evidentiary hearing does not exist in these circumstances has long been settled by judicial and legislative definition of hearing rights and does not warrant this Court's review.

II. The Decisions Of The Courts Below Are Correct.

A. *The Criteria Applied By The Board Are Valid.*

Section 403(a) of the Federal Aviation Act and Part 222 of the Board's Economic Regulations require that the Board's orders authorizing an air carrier to file tariffs providing for pickup and delivery service be based upon a finding that the proposed service is "in connection with . . . air transportation." The Board specifically made such a finding in both orders involved here (Appendix of Petition in No. 989 at 30a; Appendix of Petition in No. 1160 at 21a).

Petitioners' contention that the criteria by which the Board determined that the proposed services are "in connection with . . . air transportation" are not lawful raises the single question whether the criteria employed by the Board in making that finding have a rational relationship to the statutory phrase being applied. Whatever the form and content of petitioners' attack the question raised is the simple one: Do the Board's criteria rationally test whether a proposed service is "in connection with . . . air transportation"?

The Board's criteria, and their rational relationship to the concept of "service in connection with . . . air transportation," may be summarized as follows:

(1) In the Flint-Detroit order, the Board found that the proximity of the communities, the multiple airport complex there within a relatively limited geographical area, the nature of the dispersion of air schedules as between airports, and the inherent factors present which would continue to concentrate the area's air freight service at the Detroit airports, make Flint and Detroit a single economic unit for air freight service. This is a perfectly rational reason for concluding that the carriage

between the Detroit airports and Flint of Flint air freight to and from points beyond Detroit is service in connection with air transportation. Similarly, in the Nashua-Boston order the Board found that the dependence of Nashua upon Boston's Logan Airport for air freight service, the proximity of the communities and their close commercial and industrial affinity constituted Nashua and Boston a single economic unit for air freight service.

(2) The Board further assessed the service in light of the proposed use of specialized motor vehicle equipment (specialized in the sense that it is adapted to pickup and delivery operations). This, of course, is indicative of pickup and delivery operations and, almost by definition, tests the proposal against the statutory standard.

(3) Other criteria used by the Board were the coordination of the surface carriage with the direct air carrier schedules, the orientation of the service to purely customer air transportation needs, and the structure of rates in a manner closely relating them to pickup and delivery rates for existing pickup and delivery service within the existing 25 mile pickup and delivery zone. These basic characteristics of the service to be operated, taken together, certainly are reasonable indicators of a service "in connection with . . . air transportation."

Petitioners' argument that these criteria are invalid rests primarly on the premise that the appropriate standard by which to determine whether a service is "in connection with . . . air transportation" is that adopted by the Interstate Commerce Commission in defining areas for transfer, collection or delivery services for *surface*

freight moving on regular line-haul *surface* motor carrier or water carrier services (Petition in No. 1160 at 20). Petitioners' argument must be construed as a contention that the Interstate Commerce Act has defined and limited the definition of service in connection with air transportation required of the Board under the Federal Aviation Act and that the Board's criteria are irrevelant and irrational in terms of that definition. But in addition to the fact that there is nothing in the Federal Aviation Act which so limits the Board's judgment, the Interstate Commerce Commission itself has expressly held that different criteria should be applied in determining terminal areas for *air* carriers than those applied in the case of surface carriers.

The standard advanced by Petitioners is that articulated by the Commission for *surface* carriers in *Central Truck Lines, Inc.* v. *Pan-Atlantic S.S. Corp.*, 82 M.C.C. 395 (1960), *aff'd sub nom., Sea-Land Service, Inc.* v. *United States*, 222 F. Supp. 558 (D. Del. 1963):

> "Any service which goes beyond a single homogeneous community, identifiable as such by the factors of commercial and industrial integrity, population and business density, and the existence of some reasonably compact limit to the geographical scope of community affairs and influence, is intercommunity in character and cannot be considered as bona fide collection, delivery, and transfer service." (82 M.C.C. at 404)

This decision dealt with terminal areas for water carriers. Similar language is found in decisions dealing with terminal areas for line-haul motor freight.

Petitioners fail to point out that there are significant underlying differences in the language of the statute applied by the Commission in those cases and the language of the statute applied by the Board in the present cases. The Commission's concept of a *surface* carrier terminal

area as "a single homogenous community" was developed in the administration of sections 203(b)(8) and 202(c)(1) of the Interstate Commerce Act (49 U.S.C. § 303(b)(8), § 302(c)(1)) which expressly tied the scope of *surface* carrier terminal areas to the concept of a municipality or contiguous municipalties or adjacent commercially integrated areas. The statutory provisions of the Federal Aviation Act under which the Board issued its order in this case do not contain any language which defines the standard the Board must apply as does the language of section 203(b)(8) of the Interstate Commerce Act relating to surface carriers. The statutory language within which the Board's criteria are fashioned and against which they must be judged is simply "services in connection with . . . air transportation." The judgment required under the Interstate Commerce Act exemption for *air* transport pickup and delivery service is defined in equally general terms; section 203(b)(7a) simply refers to "transportation . . . when incidental to transportation by aircraft."

The Interstate Commerce Commission itself has specifically held that the criteria used for the establishment of terminal areas for surface carriers are *not* controlling in delineating the pickup and delivery areas for air transportation. In its decision promulgating the companion regulation to the Civil Aeronautics Board's regulation under which the Board issued its order in this case, the Commission reaffirmed the view that different considerations entered into defining pickup and delivery areas for surface carriers and for air carriers. Petitioners' assertion that the Commission adopted the surface carrier criteria in that decision and its regulation are contrary to the express conclusions of the Commission. In that decision, *Motor Transportation of Property Incidental to Transportation by Aircraft*, 95 M.C.C. 71 (1964), the Commission said:

> "In deciding not to fix a maximum mileage limitation for the 203(b)(7a) exemption, we are obviously

> disagreeing with the contentions of various parties, including petitioners, that shippers and receivers in areas adjacent to cities and communities have the same need for all modes of transportation—rail, express, water, motor vehicle, and air; and that, therefore, the terminal areas of carriers of all modes should be identical . . . . Each mode of transportation has its inherent advantages. Various economic and geographic factors sometimes prompt utilization of one mode of transportation over others. In *Kenny, supra,* we recognized that the *modus operandi* of air carriers is sufficiently different from that of land carriers as to justify special consideration in the matter of terminal area limits which may or may not be somewhat larger than those of land carriers." (95 M.C.C. at 86. Citations omitted.)

It is clear that the statutes involved do not require that the criteria applied by the Board or the Commission be other than those applied by the Board in this case.

B. *Petitioners Had No Right To An Evidentiary Hearing.*

The Board's order here involved was issued under section 222.3 of the Board's Economic Regulations. Part 222, and section 222.3 of it, were promulgated by the Board pursuant to sections 204(a) and 403(a) of the Federal Aviation Act as an application of the provisions of the latter section providing for the inclusion in air carrier air transportation tariffs of "services in connection with such air transportation." Neither section 403(a) nor section 204(a) of the Federal Aviation Act provide that the Board shall hold a hearing before issuing an order thereunder.

Moreover, the Board's determination in this case is clearly rule-making. Its determinations that pickup and delivery service is involved in air freight service to and from Nashua through Logan Airport and to and from

Flint through the Detroit airport are of future and general application and available to any air carrier whose operations between those points meet the appropriate criteria. Indeed, the Interstate Commerce Commission holds that its determination of individual commercial zone limits of surface carrier terminal areas under section 203 (b) (8) of the Interstate Commerce Act is rule-making. *St. Louis, Mo.-East St. Louis, Ill. Commercial Zone*, 61 M.C.C. 489 (1953). The provisions of the Administrative Procedure Act, 5 U.S.C. § 553(c), require, in the rule-making process, only notice and opportunity to submit "written data, views, or arguments", not an evidentiary trial-type hearing. This alone was an appropriate basis on which to deny Petitioner's claim to a hearing. See *American Airlines, Inc.* v. *CAB*, 123 App. D.C. 310, 359 F.2d 624, *cert. denied*, 385 U.S. 843 (1966).

Petitioners' argument on this point is that the Board's order is a "licensing" of the applicant before the Board, to engage in motor transportation and that in agency "licensing" a hearing must be afforded.

Assuming, *arguendo*, that the Board's action was technically "licensing," neither due process nor any other rule of law requires a hearing for that reason. The several circuit courts of appeals in which the question of the scope of the hearing requirements of the Federal Aviation Act has heretofore been considered have uniformly ruled against such a broad hearing requirement as Petitioners argue for. Thus, in *Eastern Air Lines, Inc.* v. *CAB*, 87 App. D.C. 331, 185 F.2d 426 (1950), and in *American Airlines, Inc.* v. *CAB*, 97 App. D.C. 324, 231 F.2d 483 (1956), petitioning carriers were attacking the issuance by the Board of operating authority by exemption orders to carriers competing with the petitioning carriers. This was clearly licensing, yet it was held that the exemptions could be issued without evidentiary hearings. Like the carriers asserting the right to an agency

hearing in *Eastern Air Lines, Inc.* v. *CAB, supra,* and *American Airlines, Inc.* v. *CAB, supra,* what Petitioners claim at most is a right to be free from competition. Because the complaining carriers had no constitutional right to be free from competition, *Tennessee Elec. Power Co.* v. *TVA,* 306 U.S. 118 (1939), the due process clause gave them no right to be heard before a competing service was authorized.

If, as Petitioners argue, "due process" gave them some claim to a hearing, their right was not to any particular form of hearing. *Federal Communications Commission* v. *WJR,* 337 U.S. 265 (1949). Petitioners had ample opportunity to and did present pertinent facts to the Board bearing upon the question at issue. Their presentation by means of a written answer adequately spread on the record Petitioners' version of the facts relating to an issue of this kind.

Even if a constitutionally protected interest of Petitioners had been at stake in this proceeding, and even if these were not rule-making proceedings, Petitioners had no right to the presentation and cross-examination of witnesses, for the record reveals that there were no disputed material factual issues in these cases. The only issue raised by Petitioners' pleadings and affidavits before the Board was as to the proper legal conclusion to be drawn from admitted facts.

C. *The Board's Findings Are Supported By Substantial Evidence.*

Given the validity of the Board's criteria, there is no question that the findings made by the Board that these criteria were satisfied are supported by substantial evidence. Petitioners do not in fact really contest the existence of the facts found, but only their legal significance as criteria.

CONCLUSION

For the foregoing reasons the petitions for writs of certiorari should be denied.

Respectfully submitted,

GEORGE C. NEAL
BRIAN C. ELMER
1001 Connecticut Avenue, N. W.
Washington, D. C. 20036

Of Counsel:
POGUE & NEAL

April 17, 1967

APPENDIX

Relevant Statutes

Federal Aviation Act of 1958, Section 204(a), 49 U.S.C. § 1324(a):

> (a) The Board is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this chapter, as it shall deem necessary to carry out the provisions of, and to exercise and perform its powers and duties under, this chapter.

Interstate Commerce Act, Section 202(c)(1), 49 U.S.C. § 302(c)(1):

> Notwithstanding any provision of this section or of section 203, the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—
>
> (1) to transportation by motor vehicle by a carrier by railroad subject to part I, or by a water carrier subject to part III, or by a freight forwarder subject to part IV, incidental to transportation or service subject to such parts, in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be and shall be regulated as transportation subject to part I when performed by such carrier by railroad, as transportation subject to part III when performed by such water carrier, and as transportation or service subject to part IV when performed by such freight forwarder; . . .

Interstate Commerce Act, Section 203(b)(8), 49 U.S.C. § 303(b)(8):

> Nothing in this chapter, except the provisions of section 204 of this title relative to qualifications and

maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include . . . (8) the transportation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities, except when such transportation is under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone, and provided that the motor carrier engaged in such transportation of passengers over regular or irregular route or routes in interstate commerce is also lawfully engaged in the intrastate transportation of passengers over the entire length of such interstate route or routes in accordance with the laws of each State having jurisdiction; . . .

Administrative Procedure Act, 5 U.S.C. § 553(c):

After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or argument with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.